SUPREME COURT OF THE UNITED STATES.

No. 435.

[redacted] & CO., APPELLANTS,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

[redacted]

# SUPREME COURT OF THE UNITED STATES.

## No. 186.

SOLOMON T. NICOLL & CO., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 The petition of Solomon T. Nicoll & Co., of the city of New York, to the Court of Claims.

Your petitioners respectfully represent that during the years 1847, 1848, 1849, 1850, and 1851, they imported into the United States certain quantities of liquors in casks, on which importations duties were imposed and paid by them to the United States, not only on the value of the quantity of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation, which was lost, which did not exist at the time when the duty was imposed, which was not and could not be imported into the United States.

Your petitioners claim a return of the moneys exacted from them as import duties on such leakage on non-imported liquors.

The claim of your petitioners is founded on the 16th and 21st sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the 1st section and Schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the 2d section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors, bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the cases of Marriott *vs.* Brune *et al.*, 9 Howard, 619; the United States *vs.* Southmayd *et al.*, 9 Howard, 637; and Lawrence *vs.* Caswell *et al.*, 13 Howard, 488, that, according to law, duty was chargeable only on the value of the merchandise imported into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of Supreme Court, and has allowed and paid numerous claims, resting on the same basis as the claim of your petitioners, for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions; but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors unless protests were made against the illegal exactions, now considering that by reason of the provisions of the act of February 26, 1845, in relation to the refunding of duties paid under protest, he has authority to pay only in case of protest; and as your petitioners omitted to protest, they cannot obtain from the Treasury Department payment of their just claim.

Your petitioners believe and submit that the authority of your honorable court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.

It is not in the power of your petitioners to present a detailed account of their claim, setting forth the amount thereof, because they are denied access to the papers necessary to make up such account, which are on file in the archives of the custom-house; and the Secretary of the Treasury has refused to allow that such accounts be made up unless called for by the Court of Claims.

Your petitioners therefore pray that the Secretary of the Treasury be called upon by your honorable court to cause to have prepared an account of the claim of your petitioners.

Your petitioners are owners of so much of this claim as arises on importations made on their own account, and the rightful claimants, as factor agents for foreign houses, of so much as arises on consignments to them for sale.

Your petitioners pray to be heard by counsel before your honorable court and that their claim be adjudicated.

New York, July 6th, 1855.

S. T. NICOLL & CO.

CITY AND COUNTY OF NEW YORK, *ss:*

James Clinch, a member of the firm of Solomon T. Nicoll & Co., being duly sworn, deposes and says that the matters and things set forth in the aforegoing petition are true to the best of his knowledge and belief.

JAMES CLINCH.

Sworn to this 6th day of July, A. D. 1855, before me.

GILBERT S. NIXON, *Comm. of Deeds.*

2 In the Court of Claims of the United States.

S. T. NICOLL & Co. }
*vs.*
THE UNITED STATES. }

By leave of the court the petitioners in the above cause now come and amend their petition by adding thereto the following:

The said petitioners allege that they have at all times borne true allegiance to the government of the United States and that they have not in any way voluntarily aided, abetted, or given encouragement to rebellion against said government.

S. T. NICOL & CO.,
Per EARL DOUGLASS, *Att'y in fact.*

STATE OF NEW YORK, *City and County of New York, ss:*

On this 26th day of December, 1863, before me, the undersigned, a notary public in and for the county and State aforesaid, personally appeared Earl Douglas, to me known to be the person who subscribed the foregoing amendment to the petition in the above-entitled cause in behalf of the petitioners therein, and made solemn oath that he is the agent and attorney in fact of the petitioners in said cause, and duly authorized by them to sign and verify the above amendment to their petition, and that he is personally acquainted with said petitioners and knows them to be loyal citizens of the United States, and that the facts stated in said amendment to their petition by him subscribed in their behalf are true of his own knowledge.

[SEAL.] S. KAUFMANN, *Notary Public.*

3 *Amended petition.*

United States Court of Claims.

SOLOMON T. NICOLL & Co. }
*vs.*
THE UNITED STATES. }

The claimants say further that their claim amounts to the sum of seven thousand four hundred and thirty dollars.

MORGAN L. OGDEN,
*Attorney for Claimants.*

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Before me, chief clerk of the Court of Claims, personally appeared Morgan L. Ogden, attorney for Solomon T. Nicoll & Co., and states that no assign-

ment or transfer of the above claim or any part thereof, or any interest therein, has been made; that the said claimants are justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; and that he belives the facts as stated in the original petition as now amended are true.

MORGAN L. OGDEN.

Sworn to this 8th day of March, A. D. 1864.

SAM'L H. HUNTINGTON,
*Chief Clerk Court of Claims.*

4 In the Court of Claims, October term, 1863.

S. T. NICOLL & Co.
*vs.*
THE UNITED STATES. } No. 64.

And now come the United States, by Charles Gibson, their solicitor, and say that the said petition is not sufficient in law, and the United States show to the court here the following causes of demurrer to the said petition:

1. That the petitioner seeks to recover in this action amount of certain duties illegally exacted, as he says, upon goods imported by him into certain ports of the United States, which duties he says were paid by him to the several collectors of customs at those ports. Now, the defendants say that this court has not jurisdiction to hear and determine said claim, inasmuch as Congress has by law, to wit, by the act of February 26, 1845, chap 22, and other statutes, in pari materia, provided that suit may be brought against the proper collector in all such cases, to ascertain and try the validity and legality of such demand and payment of duties, and to have a trial by jury touching the same according to the due course of law. Wherefore, the defendants say that the remedy so provided by law excludes the jurisdiction of this court, and this court has not jurisdiction to hear and determine this claim.

2. That the said petition does not aver that the claimant made a protest in writing, signed by him, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof, as required by the said act of Congress of February 26, 1845. Wherefore, the defendants say the said claimant ought not to maintain this action against the United States.

3. That the facts stated in the petition afford no ground of action against the United States.

CHARLES GIBSON, *Solicitor for U. S.*,
By J. D. McPHERSON, *Ass't Solicitor.*

December 28, 1863.

Filed Dec. 30, 1863.

5 *Joinder in demurrer.*

In the Court of Claims.

S. T. NICOLL & Co.
*vs.*
THE UNITED STATES. } No. 64.

To the demurrer filed in this case by the solicitor, on the part of the United States, the claimants, by their attorney, Morgan L. Ogden, reply as follows:

1. To so much of said demurrer as denies that this court has jurisdiction, and avers that the jurisdiction given to the circuit courts of the United States in certain cases excludes the jurisdiction of this court to hear and determine this claim, answering, says: The act of February 26, 1845, referred

Your petitioners are owners of so much of this claim as arises on importations made on their own account, and the rightful claimants, as factor agents for foreign houses, of so much as arises on consignments to them for sale.

Your petitioners pray to be heard by counsel before your honorable court and that their claim be adjudicated.

New York, July 6th, 1855.

S. T. NICOLL & CO.

CITY AND COUNTY OF NEW YORK, *ss:*

James Clinch, a member of the firm of Solomon T. Nicoll & Co., being duly sworn, deposes and says that the matters and things set forth in the aforegoing petition are true to the best of his knowledge and belief.

JAMES CLINCH.

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2 In the Court of Claims of the United States.

S. T. NICOLL & Co. }
*vs.*
THE UNITED STATES. }

By leave of the court the petitioners in the above cause now come and amend their petition by adding thereto the following:

The said petitioners allege that they have at all times borne true allegiance to the government of the United States and that they have not in any way voluntarily aided, abetted, or given encouragement to rebellion against said government.

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On this 26th day of December, 1863, before me, the undersigned, a notary public in and for the county and State aforesaid, personally appeared Earl Douglas, to me known to be the person who subscribed the foregoing amendment to the petition in the above-entitled cause in behalf of the petitioners therein, and made solemn oath that he is the agent and attorney in fact of the petitioners in said cause, and duly authorized by them to sign and verify the above amendment to their petition, and that he is personally acquainted with said petitioners and knows them to be loyal citizens of the United States, and that the facts stated in said amendment to their petition by him subscribed in their behalf are true of his own knowledge.

[SEAL.] S. KAUFMANN, *Notary Public.*

3 *Amended petition.*

United States Court of Claim

SOLOMON T. NICOLL & Co. }
*vs.*
THE UNITED STATES. }

The claimants say further that their claim amounts to the sum of seven thousand four hundred and thirty dollars.

MORGAN L. OGDEN,
*Attorney for Claimants.*

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Before me, chief clerk of the Court of Claims, personally appeared Morgan L. Ogden, attorney for Solomon T. Nicoll & Co., and states that no assign-

ment or transfer of the above claim or any part thereof, or any interest therein, has been made; that the said claimants are justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; and that he belives the facts as stated in the original petition as now amended are true.

MORGAN L. OGDEN.

Sworn to this 8th day of March, A. D. 1864.

SAM'L H. HUNTINGTON,
*Chief Clerk Court of Claims.*

4 In the Court of Claims, October term, 1863.

S. T. NICOLL & Co. vs. THE UNITED STATES. } No. 64.

And now come the United States, by Charles Gibson, their solicitor, and say that the said petition is not sufficient in law, and the United States show to the court here the following causes of demurrer to the said petition:

1. That the petitioner seeks to recover in this action amount of certain duties illegally exacted, as he says, upon goods imported by him into certain ports of the United States, which duties he says were paid by him to the several collectors of customs at those ports. Now, the defendants say that this court has not jurisdiction to hear and determine said claim, inasmuch as Congress has by law, to wit, by the act of February 26, 1845, chap 22, and other statutes, in pari materia, provided that suit may be brought against the proper collector in all such cases, to ascertain and try the validity and legality of such demand and payment of duties, and to have a trial by jury touching the same according to the due course of law. Wherefore, the defendants say that the remedy so provided by law excludes the jurisdiction of this court, and this court has not jurisdiction to hear and determine this claim.

2. That the said petition does not aver that the claimant made a protest in writing, signed by him, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof, as required by the said act of Congress of February 26, 1845. Wherefore, the defendants say the said claimant ought not to maintain this action against the United States.

3. That the facts stated in the petition afford no ground of action against the United States.

CHARLES GIBSON, *Solicitor for U. S.*,
By J. D. McPHERSON, *Ass't Solicitor.*

December 28, 1863.

Filed Dec. 30, 1863.

5 *Joinder in demurrer.*

In the Court of Claims.

S. T. NICOLL & Co. vs. THE UNITED STATES. } No. 64.

To the demurrer filed in this case by the solicitor, on the part of the United States, the claimants, by their attorney, Morgan L. Ogden, reply as follows:

1. To so much of said demurrer as denies that this court has jurisdiction, and avers that the jurisdiction given to the circuit courts of the United States in certain cases excludes the jurisdiction of this court to hear and determine this claim, answering, says: The act of February 26, 1845, referred

to in the demurrer, did not give the circuit courts of the United States jurisdiction in this to try the legality of the demand and payment of the duties sought to be recovered in this suit; and said act does not exclude this court from hearing and determining between the parties in this claim.

As to the second cause of demurrer, stated as follows:

2. That the said petition does not aver that the claimants made a protest in writing, signed by them, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof as required by the said act of Congress of February 26, 1845, answering, says: The omission of such averment in the petition is not cause for demurrer, because the claimants were not required, by the nature of their demand, the law or the facts, the rules of this court or the act cited, to make such averment.

And the claimants say that their said petition, and the mattters therein contained, in manner and form as in said petition are stated and set forth, are sufficient in law for them to have and maintain their action against the United States, and the claimants are ready to verify and prove the same as this honorable court shall direct and award. Wherefore, inasmuch as the United States, by their solicitor, hath not answered to claimants' petition, nor hitherto in any way denied the same, the claimants pray judgment, &c.

MORGAN L. OGDEN, *Att'y for Claimants.*

Washington, Dec. 30, 1863.

6 In the Court of Claims.

SOLOMON T. NICOLL & Co.
*vs.*
THE UNITED STATES. } On demurrer.

And now, to wit, on this 4th day of April, A. D. 1864, the court, upon due consideration of the premises, do sustain the said demurrer, and do further order, adjudge, and decree that the said petition be dismissed.

7 *Opinion of the court.*

In the Court of Claims, April 4, 1864.

S. T. NICOLL & Co.
*vs.*
THE UNITED STATES. } On demurrer.

CASEY, C. J.:

This is a suit by the claimants to recover from the United States the sum of seven thousand four hundred and thirty dollars, alleged to have been illegally exacted from them in the shape of duties upon certain liquors imported by them into the United States during the years from 1847 to 1851, both inclusive. It is alleged that the duty was assessed upon the liquors as invoiced in the country from whence they were imported, without regard to the leakage that occurred and the evaporation that took place on the voyage, as shown by the official gauge of the liquors taken at the custom-house.

They further alleged that the duty was only properly chargeable upon so much as was actually imported into the country, as was decided by the Supreme Court of the United States in the cases of Marriott *vs.* Brune *et al.*, 9 How., 619; United States *vs.* Southmayd *et al.*, 9 How., 637, and other cases.

The petition in this case does not set forth that the claimants made the protest required by the act of 26th of February, 1845, nor that they objected in any manner to the payment of these duties at the time. And for these reasons the solicitor for the United States demurs, alleging the want

of such protest, and that the payment was a voluntary one under a mutual mistake of law, and therefore irrecoverable. In principle this case is identical with that of Barthold, Schlessinger & Co., decided at the present term. In that case we held the want of the protest prescribed by the act of 26th February, 1845, as fatal to the claimants' right to recover. We also decided that the payment was a voluntary one under a mutual mistake of law, and therefore, under the express decision of the Supreme Court of the United States, could not be recovered back. That case rules the present. We therefore sustain the demurrer, and dismiss the petition.

LORING J.:

I am of opinion that as this case arises under the revenue laws, this court has not jurisdiction of it, for the reasons set forth in my opinion in the case of Schlessinger *et als. vs.* The United States.

8 And now, to wit, on the 28th day of April, A. D. 1864, and within ninety days after the rendition of judgment in this cause, the following notice of appeal was filed with the clerk of the Court of Claims:

In the Court of Claims.

SOLOMON T. NICOLL, JAMES CHURCH, SOLOMON TOWNSEND, and Oscot D. Dike, doing business under the style of Solomon T. Nicoll & Company, claimants,
*vs.*
THE UNITED STATES, defendants.
} Notice of appeal.

To Sam'l H. Huntington, esq., clerk of the Court of Claims:

SIR: You will please take notice that the above-named claimants appeal from the judgment of the court, rendered on the 4th of April, 1864, in the above cause, against the claimants, and in favor of the United States, to the Supreme Court of the United States.

Your obedient servant,

MORGAN L. OGDEN,
*Attorney for Claimants.*

Washington, April 28th, 1864.

9 In the Court of Claims.

CLERK'S OFFICE, *Washington, Oct.* 14, 1864.

I, Sam'l H. Huntington, clerk of the Court of Claims, do hereby certify that the foregoing is a true and correct transcript of the record of the proceedings and the judgment of the court thereon, and notice of appeal, as the same are on file in this office in case No. 64 on the docket of said court, wherein Solomon T. Nicoll & Co. are claimants *vs.* The United States defendants.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, on the day and year above written.

SAM'L H. HUNTINGTON,
*Clerk of the Court of Claims.*

Attest:

E. PECK,
*Judge of the Court of Claims.*

Filed November 24, 1864.

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